

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,  
  
Plaintiff,  
  
v.  
  
Emanuel Gerardo Cota-Ruiz, et. al.  
  
Defendants.

No. cr-11-2325-TUC-JGZ (CRP)

**REPORT AND  
RECOMMENDATION**

Pending before the Court is Defendant Ramon Varela-Rojas's Motion to Dismiss for Outrageous Government Conduct. (Docs. 33, 37, 38). Defendant Edgar Roberto Arreola-Guerra joined the Motion and provided supplemental briefing. (Doc. 41, 43). Defendants Emanuel G. Cota-Ruiz and Aureliano Navarro-Amavizca subsequently joined the Motion and the supplemental briefing filed by Defendant Arreola-Guerra; Defendants Cota-Ruiz and Navarro-Amavizca did not file their own supplements. (Docs. 44, 45). The Government contests the Motion. (Doc. 39). No replies were filed.

**Factual Summary<sup>1</sup>**

The Government alleges Defendants conspired to rob a drug stash house. The stash house was fictitious. The alleged crime was a reverse sting conducted by agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). The agents originally learned of Defendant Cota-Ruiz from a confidential informant ("CI").

The CI told ATF Special Agent Brandt that Defendant Cota-Ruiz "was looking to make money (no matter the means)." (Doc. 38-1, p. 2). As testified to by the CI in the *in*

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<sup>1</sup> The Magistrate Judge did not conduct an evidentiary hearing. The facts alleged are taken from investigative reports written by agents of the Bureau of Alcohol, Tobacco, and Firearms and Explosives who were involved in the investigation of Defendants. (Docs. 37-1, 38-2, 38-2). The Magistrate Judge also refers generally to testimony from the confidential informant taken during the *in camera* hearing and filed under seal. (Doc. 68).

1 camera hearing, the ATF agents asked the CI whether the CI knew anyone who might be  
2 interested in a stash house robbery and the CI thought of Defendant Cota-Ruiz. (Doc. 68,  
3 p. 30). The CI informed Defendant Cota-Ruiz that a friend of a friend was a disgruntled  
4 drug courier looking for a home invasion crew to rob a drug stash house. (*Id.*). The  
5 alleged disgruntled drug courier was an undercover ATF agent (“Undercover Agent”).  
6 Defendant Cota-Ruiz told the CI that he was “very interested in getting more details”  
7 about the potential stash house robbery. (*Id.*).

8 Later, in a meeting between the CI, Defendant Cota-Ruiz, Defendant Arreola-  
9 Guerra and Defendant Varela-Rojas, the CI outlined the stash house robbery scenario.  
10 (Doc. 38-1, p. 2; Doc. 38-2, pp. 7-8). Defendant Cota-Ruiz immediately asked whether  
11 the house contained marijuana or cocaine. (*Id.*). When the CI replied “cocaine,”  
12 Defendant Cota-Ruiz allegedly said “[f]uck yeah we’re interested. There’s money in  
13 that.” (*Id.*). The CI recalled that Defendant Arreola-Guerra indicated that their crew was  
14 experienced. (Doc. 38-2, p. 8). The CI also stated that Defendant Varela-Rojas was  
15 “running his mouth” at the meeting. (*Id.*). The CI’s consistent testimony was that none of  
16 the defendants were hesitant about participating in a home invasion.

17 After the meeting between the CI and Defendants Cota-Ruiz, Arreola-Guerra and  
18 Varela-Rojas, the CI introduced these Defendants to Undercover Agent, who was acting  
19 as the disgruntled drug courier. At this meeting, Defendant Cota-Ruiz asked Undercover  
20 Agent about the details of the stash house. Undercover Agent told Defendants that the  
21 house contained 22 to 39 kilograms of cocaine and Undercover Agent, as the drug  
22 courier, was given 6 to 7 kilograms. (Doc. 38-1, p. 4). Undercover Agent also told  
23 Defendant Cota-Ruiz that serious individuals occupied the stash house to which  
24 Defendant Cota-Ruiz responded Defendants would use violence if needed to deal with  
25 the occupants and that Defendants knew what they were doing. (Doc. 38-1, p. 4).  
26 Undercover Agent also allegedly told Defendants that when he enters the stash house he  
27 observes two people and that one of them is armed with a firearm. (Doc. 33, p. 4;  
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1 Defendants did not provide the page of the investigative report with this information).  
2 Defendant Navarro-Amavizca stated that upon entering the stash house, he would knock  
3 down any occupant who did not get on the ground. (Doc. 38-1, p. 6). Defendants also told  
4 Undercover Agent that they would move the cocaine to Las Vegas and New York. (*Id.*).

5 On the day of the planned robbery, Undercover Agent met with all four defendants  
6 in a parking lot of a shopping facility. (Doc. 38-2, p. 1). Undercover Agent asked and  
7 Defendants confirmed that they were ready. (*Id.*). Defendant Varela-Rojas stated they had  
8 “long guns.” (*Id.*). Defendant Varela-Rojas also told Undercover Agent that one of the  
9 defendants could strike Undercover Agent while he was in the house so the occupants  
10 would not suspect Undercover Agent’s involvement in the robbery. (Doc. 38-2, p. 2).

#### 11 **Analysis**

12 Defendants argue dismissal of the indictment against all four defendants is  
13 appropriate because the Government acted outrageously in setting up the reverse sting.  
14 Defendants allege ATF agents engineered and directed the stash house robbery from start  
15 to finish and Defendants only followed the lead of the agents. Contesting the Motion, the  
16 Government argues Defendants were willing participants and put together many aspects  
17 of the plan on their own.

18 The defense of outrageous government conduct is limited to extreme cases in  
19 which the government’s conduct is “shocking to the universal sense of justice mandated  
20 by the Due Process Clause of the Fifth Amendment.” *United States v. Gurolla*, 333 F.3d  
21 944, (9th Cir.2003) (internal quotation and citation omitted). Dismissal of an indictment  
22 for government misconduct is appropriate “only where the government’s conduct is so  
23 grossly shocking and so outrageous as to violate the universal sense of justice.” *United*  
24 *States v. Mayer*, 503 F.3d 740, 754 (9th Cir.2007) (internal quotation and citation  
25 omitted). “This standard is met when ‘the government engineers and directs a criminal  
26 enterprise from start to finish,’ but is not met ‘when the government merely infiltrates an  
27 existing organization, approaches persons it believes to be already engaged in or planning  
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1 to participate in the conspiracy, or provides valuable or necessary items to the venture.”  
2 *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir.2008) (quoting *Gurolla*, 333 F.3d  
3 at 950).

4 It is not misconduct for the government to facilitate the criminal enterprise. In  
5 *Mayer*, a Federal Bureau of Investigation (“FBI”) agent set up a fictitious meeting  
6 between an adult and an underage boy. *Mayer*, 503 F.3d at 747. After the defendant told  
7 the undercover agent that he had previously traveled to have sex with boys, the  
8 undercover agent suggested they form a travel group for the purpose of traveling to have  
9 sex with boys. The agent suggested a hotel in Mexico that could provide young boys for  
10 American tourists, and the agent directed defendant and others to a fake travel website to  
11 make their reservations. *Id.* After his arrest, the defendant argued the FBI controlled the  
12 criminal enterprise such that it was outrageous conduct and the indictment should be  
13 dismissed. The Ninth Circuit disagreed, finding the defendant was a willing participant  
14 and that the undercover agent had only facilitated the criminal enterprise. *Id.* at 754.

15 In the case before this Court, ATF agents asked the CI whether the CI knew  
16 anyone who would be interested in robbing a drug stash house. The CI brought  
17 Defendant Cota-Ruiz to the attention of ATF agents because Defendant Cota-Ruiz told  
18 the CI he “was looking to make money (no matter the means).” (Doc. 38-1, p. 2). The CI  
19 then presented Defendant Cota-Ruiz with the fictional scenario in which he and his  
20 “crew” could work with a disgruntled drug courier to rob a drug stash house that  
21 contained cocaine. Defendant Cota-Ruiz expressed great interest in the robbery because  
22 he believed there was money to be made in stealing cocaine. (*Id.*).

23 Through the course of meeting with the CI and with Undercover Agent, acting as  
24 the disgruntled drug courier, Defendants expressed continued interest in robbing the drug  
25 stash house and they actively planned the attack. They were made aware of potential  
26 dangers including one of the occupants having a gun. Defendant Cota-Ruiz responded  
27 that Defendants would use violence if needed to deal with the occupants and also said  
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1 that Defendants knew what they were doing. (Doc. 38-1, p. 4). Defendant Navarro-  
2 Amavizca stated that upon entering the stash house, he would knock down any occupant  
3 who did not get on the ground. (Doc. 38-1, p. 6). Defendants also had a plan to move the  
4 cocaine to Las Vegas and New York. (*Id.*). On the day of the planned robbery, Defendant  
5 Varela-Rojas told Undercover Agent that Defendants had “long guns.” (*Id.*). He also  
6 suggested that one of the defendants could strike Undercover Agent while he was in the  
7 house so the occupants would not suspect Undercover Agent’s involvement in the  
8 robbery. (Doc. 38-2, p. 2).

9 Defendants were not blindly led into this alleged crime. Defendants repeatedly  
10 showed that they were willing participants. Defendant Cota-Ruiz expressed, multiple  
11 times, his willingness to commit crimes for money when talking to the CI. Defendant  
12 Cota-Ruiz’s interest in committing crimes is the reason the CI thought of him when ATF  
13 agents asked whether the CI knew of anyone interested in a stash house robbery.  
14 Defendant Cota-Ruiz told the CI he was definitely interested when he asked and he  
15 learned that the stash house contained cocaine. While planning the robbery, Defendants  
16 Cota-Ruiz, Arreola-Guerra, and Varela-Rojas all emphasized their experience and ability  
17 to successfully commit the robbery as well as their willingness to use violence to  
18 complete the crime. On the day planned to commit the robbery, Defendant Navarro-  
19 Amavizca also emphasized his comfort with using violence to overcome the occupants.

20 The ATF agents’ conduct in this case was not outrageous and the indictment  
21 should not be dismissed. While ATF agents supplied a fictitious scenario in which only  
22 two occupants of a drug stash house guarded a large amount of cocaine with one gun, it  
23 was Defendants who provided plans for committing the crime and a willingness as well  
24 as a gun to engage in any necessary violence to successfully rob the house. Defendants  
25 also provided a plan for dividing up the cocaine and for moving their portion of the  
26 cocaine out of the state. Government agents did not engineer and direct the criminal  
27 enterprise from start to finish.  
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1           The Magistrate Judge notes Defendant Varela-Rojas overstates the significance of  
2 the five factor test discussed in *United States v. Williams*, 547 F.3d 1187 (9th Cir.2008).  
3 *Williams* reiterated a five factor test previously outlined by the Ninth Circuit which, if  
4 met, shows the government's conduct was not outrageous and was acceptable. The five  
5 factors include:

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7           (1) the defendant was already involved in a continuing series of similar  
8 crimes, or the charged criminal enterprise was already in process at the time  
9 the government agent became involved; (2) the agent's participation was  
10 not necessary to enable the defendants to continue the criminal activity; (3)  
11 the agent used artifice and stratagem to ferret out criminal activity; (4) the  
12 agent infiltrated a criminal organization; and (5) the agent approached  
13 persons already contemplating or engaged in criminal activity.

14 *Williams*, 547 F.3d at 1199–2000 (quoting *United States v. Bonnano*, 852 F.2d 434, 437-  
15 438 (9th Cir.1988). It is not mandatory that the government satisfy all five of these  
16 factors for the court to find the government's conduct was not outrageous. Rather, these  
17 factors “appear to function more like a balancing test than a *sine qua non* checklist of  
18 absolute requirements for government behavior to be acceptable.” *United States v.*  
19 *Simpson*, 2010 WL 1611483, \*9 (D.Ariz.2010). As guidelines for analyzing the  
20 government's behavior, the factors assist the court in considering the totality of the  
21 circumstances in each case. *Id.* at \*8.

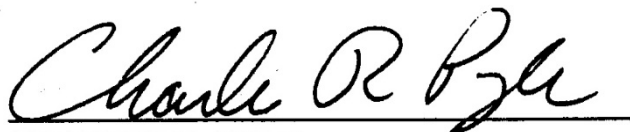
22           Considering the totality of the circumstances in the case before this Court,  
23 the ATF agents' behavior was acceptable. Defendant Cota-Ruiz communicated to  
24 the CI that he was looking to make money committing crimes and also told the CI  
25 and Undercover Agent that he and his crew were experienced criminals. When  
26 given the opportunity to rob a stash house, Defendant Cota-Ruiz gathered a crew  
27 and together Defendants devised a plan. Defendants were engaged in criminal  
28 activity in that Defendant Cota-Ruiz was searching for a criminal opportunity and  
when given one, the other defendants joined and there is no evidence that any of  
them hesitated. Further, Undercover Agent's participation was not necessary for

1 Defendants to plan what weapons they would use during the robbery, what  
2 violence they would use during the robbery and what they would do with their  
3 share of the cocaine once they stole it. As to the final three factors of *Williams*,  
4 ATF agents approached the CI inquiring about people potentially interested in  
5 robbing a drug stash house. The CI identified Defendant Cota-Ruiz because of  
6 statements Defendant Cota-Ruiz previously made to the CI about his desire to  
7 commit crimes for money. Defendant Cota-Ruiz then organized a crew, which  
8 included the other defendants, and Undercover Agent infiltrated the crew in that  
9 he acted as the disgruntled drug courier who had the connection to the stash house.  
10 The totality of the circumstances shows ATF agents did not act outrageously.  
11 Their behavior was acceptable. Defendants were willing participants who actively  
12 participated in the alleged crime.

### 13 **Recommendation**

14 Based on the above, the Magistrate Judge recommends the District Court, after its  
15 independent review DENY Defendants' Motion to Dismiss for Outrageous Government  
16 Conduct. (Docs. 33). Given the November 20, 2012 trial date, any party may serve and  
17 file written objections within **ten days** of being served with a copy of the Report and  
18 Recommendation. If objections are not timely filed, they may be deemed waived. Any  
19 responses to objections must be filed within **five days** of being served with a copy of the  
20 objections. **No replies will be permitted.** The parties are advised that any objections  
21 filed are to be identified with the following case number: **cr-11-2325-JGZ.**

22 Dated this 11th day of October, 2012.

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25 CHARLES R. PYLE

26 UNITED STATES MAGISTRATE JUDGE  
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